

BEFORE THE

Federal Communications Commission

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WASHINGTON, D. C. 20554

JUL 6 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)

)
 Amendment of Section 73.202)
 Table of Allotments)
 FM Broadcast Stations)
 (Bradenton, Florida))MM Docket No. 92-59
RM-7923To: Chief, Allocations Branch
Policy and Rules Division
Mass Media BureauOPPOSITION TO PETITION FOR RECONSIDERATION

Sunshine State Broadcasting Company, Inc. ("Sunshine"), the petitioner in the above-referenced proceeding, hereby opposes the Petition for Reconsideration ("Petition") filed May 14, 1993, by ECI License Company, L.P. ("ECI"). ECI asks reconsideration of the Report and Order, DA-9343 (released April 14, 1993), by which the Commission substituted Channel 278C for Channel 277C1 at Bradenton, Florida, and modified the license of WDUV(FM) to specify operation on the new channel.

ECI bases its Petition on the allegation that Sunshine lacks "any reasonable assurance of the availability of any [conforming] transmitter site," alleging that the Federal Aviation Administration would not authorize a tower of a height sufficient to meet the FCC's minimum requirements. The Petition raises no new issues or arguments which were not already discussed in detail in the pleadings and considered by the Commission in its Report and Order, supra.

There is a unanimity of opinion in this proceeding as to the

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applicability of the law. So long as a theoretical site exists meeting the Commission's technical rules, that site will be presumed at the allotment stage to be available and the Commission will use it as the basis for making an allotment. The Commission will, however, take into account a showing by a party that no theoretical sites exist because of environmental, air hazard, or other similar considerations. West Palm Beach, Florida, 6 FCC Rcd 6975, 6976 (1991). ECI attempted to make such a showing, and the Commission properly determined that ECI had not been successful. Accordingly, in accordance with past precedent and consistent with its policy, the Commission made the allotment and left airspace matters to the application process.

This is not a case in which there is a very small permissible site zone wholly encompassed by an airport terminal control area or an airport approach zone, or, as in the case relied on by the petitioner, where one hundred percent of the permissible zone is located inside the boundaries of an air force base. See Crestview and West Bay, Florida, 7 FCC Rcd 3059 (1992). It should be noted that the map, prepared by ECI's engineer and submitted both in ECI's Comments and in the Petition, shows an area which they define as the "permissible site zone." The total area includes 228 square miles of land area.¹ It is also significant that throughout the area there are different aeronautical considerations for different areas within the zone.

¹590 Square Kilometers. See Declaration of John J. Mullaney, Sunshine's consulting engineer, attached as Exhibit 1.

In support of its effort to show that every area within the permissible site zone would be blocked by one type of aeronautical consideration or another, ECI submitted an aeronautical study prepared by Daniel Tenold of Aviation Systems Associates, Inc. ("ASA"). In rebuttal, Sunshine submitted its own aeronautical study prepared by John P. Allen, Aerospace Consultant, who demonstrated that the ASA study was both flawed and incomplete. The ASA study purported to be an all-inclusive examination of the airspace within the "Permissible Zone" and was advanced by ECI as demonstrating that the FAA would not approve a tower anywhere within that area.

The first analysis by ASA used the reference point proposed by Sunshine. ASA found that the reference point would affect an FAA instrument departure procedure at the Peter O'Knight Airport, that the reference point is located within an area that ASA has identified as a VFR flyway, and, further, that the proposed tower would require an increase in the minimum radar vectoring altitude of the military traffic of MacDill Air Force Base. ASA concluded that "this impact [on military traffic] would be the most potent and substantial adverse impact," and went on to state that

our experience in flying hours of the civil and military radar operations for the area over the years has shown us that the FAA cannot and would not amend or increase these radar altitudes due to the close proximity of all of the airports within or close to the FAA permissible zone. ASA study at p. 2.

Mr. Allen conclusively demonstrated in his affidavit, however, that a tower at the reference point would not require any changes

to existing departure procedures at the Peter O'Knight Airport, and that alleged deficiency has not been mentioned again.

ECI's expert also failed to take into consideration a number of changed and changing circumstances concerning the airspace that they evaluated. ASA claimed that the proposed sit is within the protection area of several VFR routes, citing as the VFR routes Interstate 75, a railroad track, a highway, and the Tampa Bay coastline. Mr. Allen pointed out that, although at one time that may have been true, ASA did not take into consideration the establishment of the Tampa Terminal Control Area ("TCA"). That TCA has significant impact on VFR flight in the area, including a maximum height limitation for VFR aircraft of twelve hundred feet, as well as requirements for the installation of transponders with altitude reporting capability. Restrictions on congested areas, plus the TCA floor, would seriously reduce the association of the structure cited by ASA with the VFR route. Mr. Allen concluded that this airspace change alone has moved the VFR route much further to the east and that the VFR route through the area is associated with Highway 301, which is miles from the Sunshine reference point. Further, Mr. Allen pointed out that the roads and coastlines identified by ASA as VFR routes in fact run through four cities or towns that fall within the definition of Federal Air Regulations Part 91.119 as congested airspace. A VFR route cannot run over congested airspace because pilots are required to maintain 1,000 feet above the surface.

A VFR route determination is made by an airspace specialist

taking into consideration minimum altitude requirements, historic weather patterns, the floor of controlled airspace, and the regulatory avionics equipment associated with operations near a TCA. In short, the ASA showing was far less than compelling, because it addressed in a vacuum only the existence of a road or coastline, and failed to perform the kind of sophisticated analysis necessary in determining aeronautical impact.

Similarly, in what ASA described as the principal adverse aeronautical impact, the minimum vectoring altitude, ASA failed to address one critical component. The primary beneficiary of the minimum vectoring altitude is MacDill Air Force Base, a base the closing of which had already been announced. Further, although the FAA is in the process of revising all of the airspace requirements associated with MacDill Air Force Base, including revoking the airspace minimums associated with identified F-16 training recovery procedures, ASA did not even mention the closing of MacDill in its study. In response, ECI brought in a new expert who conceded that MacDill would be closed but asserted that the need for minimum vectoring altitudes would remain. That may be, but Mr. Allen points out that they will be changed now that MacDill no longer has a need to recover an F-16 training wing.²

Long after the date for submitting comments in this proceeding, ECI, a Commission licensee, had its agents file with the FAA a false proposal for the construction of a mythical tower

²All fighter aircraft and, apparently, all active duty aircraft will leave MacDill Air Force Base, according to the Associated Press. See Exhibit 2.

at a mythical site. On June 30, 1992, Dan Tenold, ECI's "expert," submitted FAA Form 7460-1 to the FAA regional office at East Point, Georgia. In the signature block of Form 7460-1 it states

I hereby certify that all of the above
statements made by me are true, complete,
and correct to the best of my knowledge.

That certification is signed by Daniel P. Tenold. According to the form, Mr. Tenold has certified that there is a proposal to construct a 1025-foot tower at a given set of coordinates, and that work on the tower would begin "ASAP," which is interpreted to mean as soon as possible. Obviously, none of the information is true. Neither the expert nor ECI actually proposed to construct a tower at the coordinates given, or proposed to begin work as soon as possible. Furthermore, it is noted that the submission of FAA form 7460-1 is defective because it did not include all of the information requested in Paragraph 2 of the form. Sunshine submits that it is basically improper for a Commission licensee to file false documents with the federal government for the licensee's own advantage, and that it would be improper for the Federal Communications Commission to condone this practice by using the results of a false filing.

ECI was certainly not contending that this false certification was filed to advance the public interest. Rather, ECI seeks to advance its own private interest. It is not proper conduct, and to condone these false filings and later subsequently accept them in rule-making proceedings will encourage opponents in the rule-making process to file false documents with the FAA, bogus permit

applications with agencies having supervision over environmental matters, and false proposals to zoning authorities.

In any event, the FAA's preliminary determination is not relevant under the Commission's policies and precedent. The letter is submitted for the proposition, one, that it is an unambiguous determination of hazard, which it is not, and two, that it is conclusive proof that no transmitter site could be found within the large allowable area identified by ECI in its Comments in this proceeding. The preliminary FAA letter deals only with the site specified in the bogus proposal; it does not purport to be an area-wide determination by the FAA.³

ECI also cites Crestview and West Bay, Florida, supra, for the proposition that the suitability of a transmitter site must be resolved before an allocation can be approved. In fact, the holding is just the opposite. In Crestview and West Bay, the Commission stated that it would presume in rule-making proceedings that a site was available, but that the presumption was rebuttable. In order to rebut the presumption, however, it must be shown that no fully-spaced site was available.

Subsequent events have established the wisdom of the Commission's policy. In West Palm Beach, supra, relied on so heavily by ECI, the Commission at the allocation stage considered

³The reference point is designated for data entry purposes. In Montgomery, Alabama; the Commission used as a reference point the center of the runway at Maxwell Air Force Base. See MM Docket 84-231, Window 18, Channel 241A.

an objection by a competitor based not on public interest grounds,⁴ but on air hazard issues. It was argued in West Palm Beach that the FAA would not approve a tower of sufficient height to allow WEAT-FM to upgrade from Class C1 to Class C. There were conflicting opinions by air hazard experts, with the Commission concluding that those questions were more properly left to the application phase. On December 2, 1992, the Commission granted BLH-920501KB, the application for license to cover authorized construction of WEAT-FM, West Palm Beach, Florida's new facilities meeting the requirements of a Class C FM station.

The Commission fully considered all of the arguments of ECI, the unauthorized pleadings, and the improperly submitted materials, and properly determined that it was in the public interest to substitute Channel 278C for Channel 277C1 in Bradenton, Florida, as requested by Sunshine, and to modify the license of radio station

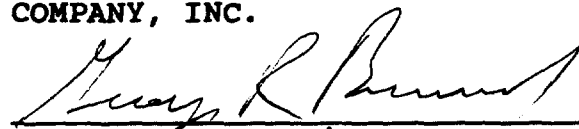
⁴The Commission has determined that Sunshine's proposal is in the public interest. a determination that was never challenged

WDUV(FM) accordingly. The decision in this proceeding should be affirmed and ECI's Petition for Reconsideration denied.

Respectfully submitted,

SUNSHINE STATE BROADCASTING
COMPANY, INC.

By:


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July 6, 1993

MULLANEY ENGINEERING, INC.

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ORIGINAL

DECLARATION

I, John J. Mullaney, declare and state that I am a graduate electrical engineer with a B.E.E. and my qualifications are known to the Federal Communications Commission, and that I am an engineer in the firm of Mullaney Engineering, Inc., and that firm has been retained by Sunshine State Broadcasting Company, Inc., licensee of Radio Station WDUV in Bradenton, Florida, to prepare an engineering statement in support of a Petition to Amend the FM Table of Assignments.

I have reviewed the engineering statement prepared by Bernard R. Segal, P.E., on behalf of Entertainment Communications, Inc. That statement contained a permissible site zone map for the proposed allotment of FM Channel 278C at Bradenton, FL. The permissible land area indicated by that map is 590 square kilometers (228 square miles).

All facts contained herein are true of my own knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.


John J. Mullaney

Executed on the 2nd day of July 1993.

Commission overrules Pentagon on air bases

Contrary to Pentagon recommendations, the base closing commission suggested saving Homestead Air Force Base.

Associated Press

WASHINGTON — Overriding the Pentagon, the base closing commission voted Thursday to give New Jersey's McGuire Air Force Base a major new role in restructured U.S. air power.

It called for closing bases in New York and Michigan but saving hurricane-battered Homestead Air Force Base.

The panel recommended shutting down two air bases — Plattsburgh in New York and K.I. Sawyer in Michigan — and taking operations away from others. The Pentagon had recommended closing McGuire as an active-duty base and turning it into a reserve facility.

The decisions mean thousands of jobs lost or gained for the bases and nearby cities involved, and home-state politicians reacted accordingly.

"I'm deeply disappointed," said Sen. Carl Levin, D-Mich.

In another decision going against the Pentagon, the panel voted to save Homestead, which was devastated by Hurricane Andrew.

The list of changes compiled by the commission in meetings through Sunday will go to the White House. President Clinton will have until July 15 to accept or reject the list. If he turns it down, the panel has an additional month to change the list and submit it to Clinton a final time.

If the president accepts a list, he sends it to Congress, where lawmakers have 45 working days to vote it up or down with no changes permitted.

Thursday's decisions came after wide-ranging debate on where best to place the nation's bombers, air transport planes and refueling tankers at a time the size of the military is being reduced in line with the end of the Cold War and breakup of the Soviet Union.

Members of the Defense Base Closure and Realignment Commission said recommended closing bases reluctantly after receiving thousands of letters from the communities involved warning of grave economic impact.

As one part of a new Air Force strategy, the Pentagon has decided to create "air mobility" bases that would combine airlift and refueling plans.

The Pentagon had sought to make Plattsburgh Air Force Base the mobility base for the East Coast, but the panel decided that McGuire in New Jersey had a better location near supporting units.

The commission's chairman, James Courter, is a former New Jersey congressman. He said after voting with the 6-1 majority on McGuire: "I get criticized either way. If my votes hurt New Jersey, then I'm demonstrating my independence. If my vote helps the state, I'm not independent."

At Homestead, air defense aircraft as well as two Air Force Reserve units will stay at the base under the commission plan, which rejects the Defense Department proposal to close the base.

"This is hope fulfilled," said Sen. Connie Mack, R-Fla.

Status of bases

A list of the facilities — Army, Air Force and Marines — that the Defense Base Closure and Realignment Commission has voted to keep open, close or realign:

Keep open

Fort McClellan, Ala.
Fort Lee, Va.
8th Army Headquarters at Presidio in San Francisco.
Fort Gillem, Ga.
Fort McPherson, Ga.
Fort Monroe, Va.
Marcus Hook, Pa., Army Reserve Center.
Presidio of Monterey, Fort Ord, Calif.
Consolidate the Presidio of Monterey Annex, Fort Ord, Calif., as needed to support the Defense Language Institute.
Letterkenny Army Depot, Pa., consolidating Tactical Missile Interservicing from eight other facilities.
Grand Forks AFB, N.D.
Fairchild AFB, Wash.
Logistics Base, Albany, Ga.
Logistics Base, Barstow, Calif.

Close

Vint Hill Farms, Va.
Plattsburgh Air Force Base, N.Y.
K.I. Sawyer Air Force Base, Mich.
O'Hare International Airport Air Force Reserve Station, Chicago will be moved.

Realign

Fort Belvoir, Va.
Fort Monmouth, N.J.
Tooele Army Depot, Utah.
Griffiss Air Force Base, N.Y.
March Air Force Base, Calif.
Homestead Air Force Base, Fla.
McGuire Air Force Base, N.J., to be established as East Coast Mobility Base.
McDill Air Force Base, of Tampa, Fla., remains realigned but 482nd Fighter Wing will remain at Homestead Air Force Base and the Joint Communication Support Element remains at McDill.

Very truly yours,

CERTIFICATE OF SERVICE

I, Kathleen Dame, an employee of the law firm Borsari & Paxson, hereby certify that a true copy of the foregoing OPPOSITION TO PETITION FOR RECONSIDERATION was sent this 6th day of July, 1993, via first class United States mail, postage prepaid, to each of the following:

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